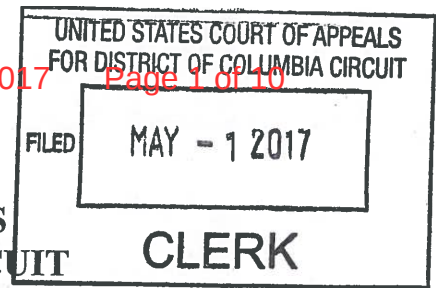


UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT



MATSON TERMINALS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS
BOARD,

Respondent.

Case Number: 17-1124

**PETITION FOR REVIEW OF A DECISION AND ORDER
OF THE NATIONAL LABOR RELATIONS BOARD**

Notice is hereby given this 28th day of April, 2017, that petitioner Matson Terminals, Inc., hereby petitions the United States Court of Appeals for the District of Columbia Circuit for review of, and requests the Court set aside, the Decision and Order entered by Respondent National Labor Relations Board on the 7th day of April, 2017 in case 20-CA-187970, and found at 365 NLRB No. 56. A copy of the decision and order is attached to this petition. This petition is proper under 29 U.S.C. § 160(f) and Rule 15 of the Federal Rules of Appellate Procedure.

Respectfully submitted,



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Christopher S. Yeh (Bar No.)
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Counsel for Petitioner
Matson Terminals, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2017, a true and correct copy of the foregoing Petition for Review, with attachments, was served by U.S. Postal Service on the following:


John H. Ferguson, Associate General
Counsel
Linda J. Dreeban, Appellate and
Supreme Court Litigation
Division of Enforcement Litigation
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Office of the Executive Secretary
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Christopher S. Yeh

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Matson Terminals, Inc. and Hawaii Teamsters & Allied Workers Union, Local 996. Case 20-CA-187970

April 7, 2017

DECISION AND ORDER

BY ACTING CHAIRMAN MISCIMARRA AND MEMBERS
PEARCE AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge and an amended charge filed on November 9 and December 16, 2016, respectively, by Hawaii Teamsters & Allied Workers Union, Local 996 (the Union), the General Counsel issued the complaint on December 29, 2016, alleging that Matson Terminals, Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain with it following the Union's certification in Case 20-RC-173297. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On February 1, 2017, the General Counsel filed a Motion for Summary Judgment. On February 3, 2017, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent thereafter filed an opposition to the summary judgment motion.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification of representative on the basis of its contention that the petitioned-for employees are statutory supervisors as defined by the Act and/or are managerial employees excluded from the Act's coverage.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine

the decision made in the representation proceeding.¹ We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.²

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Hawaii corporation with offices and a facility located in Hilo, Hawaii, has been engaged in providing stevedoring and terminal operations.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its operations described above, purchased and received goods at its Hilo facility valued in excess of \$50,000 from points outside the State of Hawaii.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

At all material times, Kevin Dietsch held the position of the Respondent's vice president and has been an agent of the Respondent within the meaning of Section 2(13) of the Act.

Following the representation election held on May 19, 2016, the Union was certified on May 27, 2016, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

¹ In its answer to the complaint and its opposition to the General Counsel's Motion for Summary Judgment, the Respondent raises, for the first time in these proceedings, the argument that certification was improper because the petitioned-for employees are managerial employees excluded from the Act's coverage. The Respondent advances no evidence in support of this argument, however, and presents no reason as to why this argument was not raised in the prior representation proceeding.

² The Respondent's request that the complaint be dismissed is therefore denied.

Member Miscimarra would have granted review in the underlying representation proceeding regarding whether the petitioned-for supervisors and senior supervisors possess supervisory authority under Sec. 2(11) of the Act. While he remains of that view, he agrees, however, that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice proceeding and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.

All full-time and regular part-time supervisors and senior supervisors employed by Matson Terminals, Inc. on the Island of Hawaii, excluding all other employees, managers, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

By letter dated August 15, 2016, the Union requested that the Respondent recognize and bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since about October 26, 2016, the Respondent has failed and refused to recognize and bargain with the Union.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since October 26, 2016, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enf'd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enf'd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Matson Terminals, Inc., Hilo, Hawaii, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Hawaii Teamsters & Allied Workers Union, Local 996 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time supervisors and senior supervisors employed by Matson Terminals, Inc. on the Island of Hawaii, excluding all other employees, managers, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Hilo, Hawaii, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 26, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MATSON TERMINALS, INC.

3

Dated, Washington, D.C. April 7, 2017

Philip A. Miscimarra, Acting Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Hawaii Teamsters & Allied Workers Union, Local 996 as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate bargaining unit:

All full-time and regular part-time supervisors and senior supervisors employed by us on the Island of Hawaii, excluding all other employees, managers, guards, and supervisors as defined in the Act.

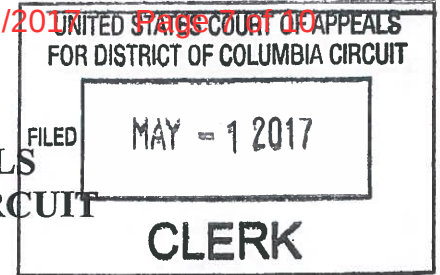
MATSON TERMINALS, INC.

The Board's decision can be found at www.nlr.gov/case/20-CA-187970 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.





UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT



MATSON TERMINALS, INC.,

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NATIONAL LABOR RELATIONS
BOARD,

Respondent.

Case Number: 17-1124

PETITIONER'S CORPORATE DISCLOSURE STATEMENT

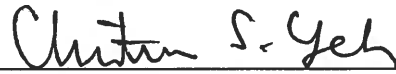
Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the undersigned counsel for Petitioner Matson Terminals, Inc., makes the following disclosure:

Petitioner is engaged in the business of providing container stevedoring, terminal, vessel husbanding and equipment maintenance services.

Matson Navigation Company, Inc. is the parent company of Petitioner Matson Terminals, Inc. and owns all its stock. Matson, Inc. is a public-traded company and is the parent company of Matson Navigation Company, Inc. Matson,

Inc. owns all of Matson Navigation Company, Inc.'s stock. No other publicly held company owns 10% or more of the equity of Matson Terminals, Inc.

Dated: April 28, 2017.



Barry W. Marr (Bar No. 55494)

Christopher S. Yeh (Bar No.)

MARR JONES & WANG LLLP

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Fax No. (808) 536-6700

Email: cyeh@marrjones.com

Counsel for Petitioner Matson Terminals,
Inc.

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2017, a true and correct copy of the foregoing Petition for Review, with attachments, was served by U.S. Postal Service on the following:

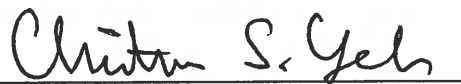
John H. Ferguson, Associate General
Counsel
Linda J. Dreeban, Appellate and
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Division of Enforcement Litigation
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Christopher S. Yeh

MARR JONES & WANG

A LIMITED LIABILITY LAW PARTNERSHIP

Labor and Employment Law

FILED

MAY - 1 2017

CLERK

TRANSMITTAL SHEET

Clerk of the Court
 United States Court of Appeals
 for the District of Columbia Circuit
 333 Constitution Avenue, NW
 Washington, DC 20001-2866

DATE: April 28, 2017

☒ U.S. Mail
☐ Hand Delivery
☐ _____

RE: **Matson Terminals, Inc. v. NLRB**

DOCUMENTS TRANSMITTED:

17-1124

<u>Copies</u>	<u>Dated</u>	<u>Description</u>
Original + 10 copies	4/27/17	Petition for Review of a Decision and Order of the National Labor Relations Board
Original + 5 copies	4/27/17	Petitioner's Corporate Disclosure Statement
Original	4/27/17	Marr Jones & Wang Check #5684 (filing fee for Petition for Review)

<input checked="" type="checkbox"/> For your information	<input type="checkbox"/> For your files
<input type="checkbox"/> Per your request	<input type="checkbox"/> Per our conversation and agreement
<input checked="" type="checkbox"/> For necessary action	<input type="checkbox"/> For signature (black ink) and return
<input checked="" type="checkbox"/> See remarks below	<input type="checkbox"/> For signature (black ink), forwarding as noted below, and return

REMARKS: Please find enclosed the original + 10 copies of a Petition for Review for filing and service on parties. Also enclosed are the original + 5 copies of Petitioner's Corporate Disclosure Statement for filing. We would appreciate the return of one (1) filed-marked copy of each document, and a self-addressed, postage prepaid envelope is being provided for this purpose. Should you have any questions, please contact Kelly Nishimura at (808) 566-5609. Thank you.


 Kelly Nishimura

ORIGINAL